United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 16, 2007

TO : Ralph R. Tremain, Regional Director

Region 14

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Christian Disposal, LLC 625-6612

Case 14-CA-28980 625-7742-3300

This case was submitted for advice as to whether the Employer's alleged violations of Section 8(a)(1) and (3) preclude a fair rerun election so that a <u>Gissel</u> bargaining order is needed to remedy those violations. I

[FOIA Exemption 5

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FACTS

Overview

The Employer (Christian Disposal) is engaged in the collection and disposal of solid waste. In April 2007, 2 the Union (International Association of Machinists and Aerospace Workers) began a campaign to organize the Employer's 34 mechanics, lube techs, and drivers. On April 27, the Union held its first organizing meeting at a local restaurant. Fourteen employees attended the meeting. Between April 27 and May 3, 24 employees signed petitions authorizing the Union to represent them as their bargaining representative (18 signed the petitions at Union meetings and six signed petitions circulated by employees Brown, Saeger, and Tighe). Thereafter, the Union held weekly evening meetings at local venues. Employees wore Union tshirts to work and some placed Union bumper stickers on vehicles parked in the Employer parking lot. On May 10, the Union filed a petition for a representation election,

 $^{^{1}}$ NLRB v. Gissel Packing Co., 395 U.S. 575, 614-615 (1969). The request for 10(j) relief will be addressed in a separate memorandum.

² Hereafter all dates are 2007 unless otherwise indicated.

which was scheduled for June 15. On about June 5, the Union obtained 19 signatures on "Vote Yes" petitions.

The Board conducted an election on June 15, which the Union lost by a vote of 13 to 15.3 The Union filed objections to the election, as well as numerous unfair labor practice charges. The Region has concluded that the Employer responded to the Union organizing campaign by engaging in a variety of unfair labor practices. As set forth below, the Employer made two hallmark threats to close the facility and numerous non-hallmark 8(a)(1) statements; more strictly enforced its policies by issuing disciplinary write-ups to employees for conduct that the Employer had previously condoned; discriminatorily discharged two employees; and imposed more onerous working conditions by requiring an employee to work contrary to medical restrictions, changing two employees' start times, and changing an employee's payment calculation method.

Threats of closure and other 8(a)(1) statements

In mid-April, supervisor Wheelahan told employee Keeser that the owner had deep pockets and if the Union ever came in, he would just put a lock on the gate and he would be the only one with a key. On April 27, Wheelahan asked employee Schomburg whether he knew anything about the Union. Schomburg responded that he knew a little. Wheelahan stated that I hope these people know what [they're] getting into. Our owner will put a lock on this gate and nobody will have a key and no one will have a job come Monday. There is no evidence that these threats were disseminated to other employees. Also on April 27, President McLaughlin asked employee Brown, a union activist, about the Union the employees were trying to get in. Brown acknowledged that the employees were talking to the Union.

On May 2, the Employer held a mandatory employee meeting at the facility, and both Owner Drury and President McLaughlin attended. Drury apologized to employees for not visiting more often and for "burying his head in the sand." He also asked employees not to bring the Union in but to give him some more time to fix things.

Disciplinary write-ups and more onerous working conditions

Prior to the Union organizing drive, the Employer did not generally discipline employees for tardiness, absence

³ There were three determinative challenges; two were votes by discriminatees Toliusis and Johnson.

from work, or for being involved in accidents causing damage to property.⁴ Between May 4 and July 2, the Employer issued 12 write-ups to eight employees regarding tardiness, absenteeism, or accidents.⁵ Examples of the write-ups and more onerous working conditions are below.

On May 4, supervisor Wheelahan gave trash truck driver Keeser a write-up for scraping a private car with the lid of a trash can. Keeser reported the incident to Wheelahan at the time it took place but disputed the car owner's claim that it caused damage to the car, noting that the color of paint deposited on the damaged car was different from the color of the trash can.

On May 15, Wheelahan called employee Schomburg into his office and gave him a write-up for bending the automated arm on his trash truck a few days earlier, when Schomburg backed into a light pole. [FOIA Exemptions 6, 7(C), and 7(D)] he had been involved in similar accidents but had not been disciplined.

On May 23, President McLaughlin called driver DeWolfe into his office and gave him a letter from a customer complaining that DeWolfe was not arriving at a landfill in a timely manner. McLaughlin showed DeWolfe a hand-written schedule listing DeWolfe's arrival time at that landfill as 6:30 a.m. each day. According to DeWolfe, he had never before seen a written schedule and had never had a set start time. Rather, [FOIA Exemptions 6, 7(C), and 7(D)] his duties required him to deliver three loads in ten hours and that prior to May 23, he had been permitted to deliver his three loads at any time within ten hours. McLaughlin asked DeWolfe if he wanted a write-up or a copy of the customer letter placed in his personnel file, and DeWolfe agreed to put the letter in his file. The following day, DeWolfe asked McLaughlin for a copy of the customer letter. McLaughlin asked DeWolfe whether he was going to provide a

⁴ The Employer submitted evidence indicating that it had issued four write-ups to employees in 2003 and 2004 for tardiness and attendance, and four write-ups to employees from August 2005 through May 4, 2007 for incidents resulting in property damage. Employees testified that prior to the organizing campaign, employees frequently had been tardy and absent from work, and had been involved in accidents, and that the Employer did not usually discipline them for that conduct.

⁵ Employees testified that driver Giefer, who openly opposed the Union, was not disciplined although he was involved in an accident in May.

copy to the Union and DeWolfe stated that he was. [FOIA Exemptions 6, 7(C), and 7(D)] the Employer knew he supported the Union and that until this incident, he had not been written up or called into the office and questioned about his performance for any reason.

On May 31, employee Saeger left his trash route early because he was feeling ill. Before Saeger left, Wheelahan gave him a write-up for arriving late on May 30 and 31, and told him that if he did not obtain a doctor's excuse the early departure would be unexcused. Saeger returned to the facility later that day and gave Wheelahan a note from an urgent care center stating that he should not work in the sun through June 1. Wheelahan asked Saeger if he could handle working the same route on June 1, and Saeger responded that he could not because he was medically restricted from working in the sun. On June 1, Saeger reported for work and Wheelahan assigned him to the same duties that he had performed on May 31.

On June 19, following the election, driver Zika was involved in an accident requiring repairs to his truck. Wheelahan sent Zika home until his truck was again available on June 23. Zika used 18 hours of his vacation time to cover for this time off work because the employees' vacation pay rate was higher than the rate they received for "down time" (i.e. when drivers are not working because their trucks are unavailable or are being serviced). Zika's paycheck covering the period between June 19 and June 23 indicated that the Employer deducted Zika's vacation hours and thus treated those hours as vacation time. However, it changed the manner of calculating the vacation time by paying him at the lower "down time" rate instead of at the higher vacation pay rate.

On June 25, Supervisor Rose and President McLaughlin told drivers Scherrer and Tighe (a union activist) that beginning July 2, they were to start work at 5:30 a.m. Prior to that date, Scherrer started between 7:00 and 7:30 a.m., and Tighe started between 7:30 and 8:00 a.m., notwithstanding that other employees started at 5:30 a.m. According to Tighe, the Employer had never previously told him that his 8:00 a.m. start time was a problem, and neither Rose nor McLaughlin explained why they were changing the two employees' start times.

On July 2, the date Tighe was scheduled to begin his 5:30 a.m. start time, he overslept and arrived late. Supervisor Rose gave Tighe a write-up for tardiness and explained to him that he was written up because of the "Union stuff." When the Union filed an amended unfair labor practice charge alleging that the change in start

times was unlawful, Rose asked Tighe why he had filed the charge.

Discharges of employees Toliusis and Jones

Employee Toliusis had worked for the Employer twice previously. She began work as a driver in June 2005 and was discharged in April 2006 after she lost her CDL (commercial driver's license) for driving while intoxicated. In May 2006, the Employer, who was having trouble finding CDL-licensed drivers, rehired Toliusis. She drove a truck until August 2006, when the Employer hired a CDL-licensed driver.

In March 2007, the Employer rehired Toliusis as a laborer. On April 18, Toliusis passed the written portion of her CDL test and obtained her CDL permit. She was scheduled to take the driving portion of her CDL test on May 18. Later in April, the driver with whom Toliusis was riding had a problem driving and asked Toliusis to drive. Missouri law allows drivers with CDL permits to drive a commercial vehicle if accompanied by a CDL-licensed driver. Other employees have also testified that the Employer has permitted drivers with CDL permits to drive a truck. Toliusis drove about ½-block to the next stop, then told the driver to take his seat back.

On May 2, Toliusis tape-recorded the Employer's captive audience meeting (discussed above) and told employees what she had done at the Union meeting that evening. On May 12, while Toliusis was sitting outside President McLaughlin's office, McLaughlin asked her why she had recorded the Employer's May 2 meeting. Toliusis explained that she recorded it because she ordinarily took notes after meetings but did not have time to do so before the Union meeting that night. Mclaughlin then asked Toliusis if she had driven a truck. Toliusis said that she had, and explained the circumstances under which she had done so in late April. McLaughlin responded, you better watch yourself. On May 15, after Toliusis had finished her route, supervisor Wheelahan told her to follow him into McLaughlin's office. McLaughlin then told Toliusis that she had put the Company in jeopardy by driving the truck and that as a result, he was going to let her go. Toliusis responded that she was just trying to keep the route on an even keel and doing what she was told. McLaughlin answered that she was doing what she was told by a driver, not a

⁶ Under Missouri law, CDLs are revoked for one year following DWI convictions, and the driver must retest to get the CDL reinstated.

supervisor. Other employees testified that the Employer has assigned employees to drive without their CDL licenses. Toliusis had received no previous discipline before her discharge.

Employee Johnson was hired as a lube tech on March 12. According to Johnson, during his first two months of employment, the Employer did not discipline him even though he had been tardy and absent. On May 14, Supervisor McArthur told Johnson to sign a form entitled "Requirements of Shop Employees." One of the "requirements" was that employees report to work on time. On May 15, when Johnson had not arrived by his scheduled time, McArthur called him on his cell phone. Johnson said that he had overslept and was on his way. He arrived 52 minutes late. McArthur gave him a write-up for arriving late and for not calling in to report that he would be late. On May 17, Johnson telephoned 15 minutes before his scheduled shift to say that he would be absent. On May 18, McArthur gave Johnson a write-up for failing to call in his absence two hours in advance. McArthur showed Johnson an employee handbook requiring two-hour advanced notice of absences. According to Johnson, no one had previously shown him the handbook. Later that day, McArthur called Johnson into President McLaughlin's office and McLaughlin told Johnson that his absences and latenesses would no longer be tolerated. Johnson agreed to do better. McLaughlin then told Johnson that "the Union would not really change things around there."

On May 22, Johnson telephoned to say that he would be arriving late for work. When he arrived, McArthur gave Johnson a write-up and told him that he could no longer tolerate Johnson's tardiness and that Johnson was terminated. McArthur told Johnson that he had shown the write-up to President McLaughlin.

ACTION

[FOIA Exemption 5

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 $^{^{7}}$ Johnson was still in the Employer's 90-day probationary period.

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B.J.K.